

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Pending before the Court is Defendants' Motion to Dismiss Plaintiff Wells' Amended Complaint. (Doc. 128.) For the following reasons, the Motion is granted.

BACKGROUND

This case arises from Defendant American Polygraph Association’s (“APA”) January 29, 2013 revocation of the Arizona Polygraph School’s (“School”) accreditation. Plaintiff Laura Wells purchased the School in 2007. (Doc. 120 ¶ 3.1.) She applied for APA accreditation of the School and was granted that accreditation on September 10, 2007. (*Id.* ¶ 3.2.) In February 2012, the School began to offer a pilot version of a hybrid polygraph course, combining both on-line and classroom instruction. (*Id.* ¶ 3.16.) According to the APA manual, member schools must notify the APA when they begin a new course. (*Id.* ¶ 3.17.) Wells alleges that she followed this protocol. (*Id.*) In May 2012, the School began their first official hybrid course and Wells alleges that she informed the APA of this change according to the procedures outlined in the APA manual. (*Id.* ¶ 3.19.) The School began additional hybrid courses in June 2012, August 2012, September 2012,

1 and January 2013 (*Id.* ¶¶ 3.2, 3.23–25).

2 In October 2012, Defendant McLoughlan requested more information about the
 3 School’s hybrid course. (*Id.* ¶ 3.29). On November 5 and 6, 2012, Defendant Ortiz
 4 performed an inspection of the School. (*Id.* ¶ 3.31.) On November 24, 2012, Wells
 5 alleges that Ortiz submitted his APA Polygraph School Inspection Report (“Report”)
 6 which “contained numerous libelous statements regarding the school.” (*Id.* ¶ 3.34.) The
 7 Report included statements suggesting that Wells had not sought APA approval to have
 8 hybrid courses at the School because she thought approval would take too long. (*Id.* ¶
 9 3.35.) The Report also included what Wells claims are false accusations about her
 10 experience as a practicing polygraphist and various deficiencies in the operation of the
 11 School. The Report stated that the hybrid course did not meet APA requirements. (*Id.* ¶
 12 3.45.) Wells asserts that the Report was inconsistent and failed to follow the rules of the
 13 APA procedural manual. (*Id.* ¶ 3.46.) In March 2013, Wells learned that the APA had
 14 revoked the School’s accreditation in January 2013. (*Id.* ¶ 3.50.) In September 2013,
 15 Wells claims she received a letter from the APA threatening her with an investigation and
 16 the loss of her individual APA membership. (*Id.* ¶ 4.61.)

17 This case has an extensive procedural history. In relevant part, Wells and a
 18 number of Co-Plaintiffs filed the first Complaint in this action on March 25, 2013. (Doc.
 19 1.) The Court dismissed Wells’ Co-Plaintiffs and any claims Wells purported to bring on
 20 their behalf in an Order dated February 3, 2014. (Doc. 119 at 6.) The remaining claims in
 21 this action are Wells’ antitrust claim asserting personal damages (*Id.* ¶¶ 4.62–73), her
 22 libel and slander claims (*Id.* ¶¶ 4.1–3), and her separate and individual claim for
 23 negligence (*Id.* ¶¶ 4.74–84). Defendants now move to dismiss those remaining claims.
 24 (Doc. 128.)

25 DISCUSSION

26 I. Legal Standard

27 Rule 12(b)(6) is designed to “test the legal sufficiency of a claim.” *Navarro v.*
 28 *Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive dismissal for failure to state a claim

1 pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint or counterclaim must
2 contain more than “labels and conclusions” or a “formulaic recitation of the elements of a
3 cause of action”; it must contain factual allegations sufficient to “raise a right to relief
4 above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
5 While “a complaint need not contain detailed factual allegations . . . it must plead
6 ‘enough facts to state a claim to relief that is plausible on its face.’” *Clemens v.*
7 *DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Twombly*, 550
8 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content that
9 allows the court to draw the reasonable inference that the defendant is liable for the
10 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550
11 U.S. at 556). Plausibility requires “more than a sheer possibility that a defendant has
12 acted unlawfully.” *Twombly*, 550 U.S. at 555. Accordingly, a plaintiff must do more than
13 employ “labels,” “conclusions,” or a “formulaic recitation of the elements of a cause of
14 action.” *Id.*

15 When analyzing a complaint or counterclaim for failure to state a claim under
16 Rule 12(b)(6), “[a]ll allegations of material fact are taken as true and construed in the
17 light most favorable to the nonmoving party.” *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th
18 Cir. 1996). However, legal conclusions couched as factual allegations are not given a
19 presumption of truthfulness, and “conclusory allegations of law and unwarranted
20 inferences are not sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d
21 696, 699 (9th Cir. 1998).

22 **II. Antitrust Claim**

23 In her remaining antitrust claim, Wells states that she received a September 4,
24 2013 letter from the APA threatening her with an investigation and the loss of her
25 individual APA membership. (Doc. 120 ¶ 4.61.) She alleges that this threat violated § 2
26 of the Sherman Act, 15 U.S.C. § 2, and has caused her personal harm. Defendants move
27 to dismiss on the grounds that Plaintiff has failed to state a cognizable antitrust claim.
28 Section 2 of the Sherman act prohibits monopolization, attempts to monopolize, and

1 conspiracies to monopolize. *Id.* “The offense of monopoly under § 2 of the Sherman Act
 2 has two elements: (1) the possession of monopoly power in the relevant market and (2)
 3 the willful acquisition or maintenance of that power as distinguished from growth or
 4 development as a consequence of a superior product, business acumen, or historic
 5 accident.” *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992).

6 In her Complaint, Wells states that “Defendant APA enjoys monopoly power”
 7 (Doc. 120 ¶ 4.58) and that, following the School’s loss of accreditation, she received a
 8 letter from the APA “threatening her with an investigation” and “the loss of her
 9 individual APA membership” (*Id.* ¶ 4.61). Plaintiff states no facts that connect the APA’s
 10 alleged monopoly with the letter threatening the investigation or loss of her membership.
 11 She does not establish how the letter might plausibly constitute an illegal monopolistic
 12 act. In her Response to Defendants’ Motion, Plaintiff does not address this issue, but
 13 instead appears to continue to reassert her already dismissed claims under Section 1 of
 14 the Sherman Act and her also dismissed claim on behalf of the School under Section 2.
 15 (Doc. 131 at 7–12.) Plaintiff has failed to state a plausible claim on behalf of herself
 16 under § 2 of the Sherman Act and thus her remaining antitrust claim is dismissed.

17 **II. Libel and Slander Claims**

18 Defendants next move to dismiss Plaintiff’s two remaining libel claims and one
 19 remaining slander claim. “To be defamatory, a publication must be false and must bring
 20 the defamed person into disrepute, contempt, or ridicule, or must impeach plaintiff’s
 21 honesty, integrity, virtue, or reputation.” *Turner v. Devlin*, 174 Ariz. 201, 203–04, 848
 22 P.2d 286, 288–89 (1993) (quoting *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz.
 23 335, 341, 783 P.2d 781, 787 (1989)). “To be actionable as a matter of law, defamatory
 24 statements must be published in such a manner that they reasonably relate to specific
 25 individuals While the individual need not be named, the burden rests on the plaintiff
 26 to show that the publication was “of and concerning” him.” *Hansen v. Stoll*, 130 Ariz.
 27 454, 458, 636 P.2d 1236, 1240 (Ct. App. 1981) (citing Restatement (Second) of Torts §§
 28 564, 617).

1 In her first remaining libel claim, Wells alleges that “APA Agent Ortiz did
 2 intentionally make libelous statements in The Report causing extreme emotional distress,
 3 monetary loss, humiliation and loss of reputation to the Plaintiff.” (Doc. 120 ¶ 4.1.)
 4 Plaintiff asserts that Agent Ortiz made a variety of objectionable statements in the Report.
 5 (*Id.* ¶¶ 3.34–45.) However, all but two of these statements concern the School and not
 6 Wells. The first statement that regards Wells states, in response to Ortiz asking her who
 7 at the APA had approved the hybrid courses, Wells claimed “[n]o one from the APA
 8 gave me approval, if I had to wait for their approval it would take forever.” (*Id.* ¶ 3.35.)
 9 Plaintiff has failed to plausibly plead that this allegedly false statement called her into
 10 disrepute or impeached her honesty, integrity, virtue or reputation.

11 The second statement alleges that “[e]ach primary course instructor does not have
 12 sufficient documentation on file to verify that they meet or exceed” certain requirements,
 13 including that she have a college degree and have taken a basic polygraph course. (*Id.* ¶
 14 3.37.) Wells is one of the two primary course instructors at the school and claims that she
 15 does meet these requirements. (*Id.* ¶ 3.38.) She does not actually assert that she had the
 16 required documentation of this on file at the time of the inspection, but instead states that
 17 “[a]ll of Plaintiff Wells’ academic degrees are all displayed on the walls of the school –
 18 in plain sight.” (*Id.*) Plaintiff has both failed to plead that the second statement was false
 19 and to plausibly plead that this statement about what documentation she had on file at the
 20 school called her into disrepute or impeached her honesty, integrity, virtue or reputation.
 21 Thus, Plaintiff fails to state a claim for libel.

22 In her second remaining libel claim, Wells states that “APA Agents McCloughan
 23 and Cushman did intentionally make libelous statements regarding The School’s
 24 accreditation status in e-mails sent to past students causing extreme emotional distress,
 25 monetary loss, humiliation and loss of reputation to the Plaintiff.” (Doc. 120 ¶ 4.3.) Wells
 26 does not specify the contents of these alleged statements in this section of her Complaint,
 27 but she refers elsewhere in her Complaint to an e-mail allegedly sent from Defendant
 28 Cushman to a student, stating that the hybrid courses did not meet the APA standards.

1 (Id. ¶ 3.61.) Then, in a later e-mail to that same student, Wells alleges that Cushman told
 2 the student the School was “substandard.” (Id. ¶ 3.62.) Here, Plaintiff fails to establish
 3 that these statements actually concerned her and did not just concern the School.
 4 Therefore, she again fails to state a claim for libel.

5 In her remaining slander claim, Wells asserts that “APA Agent Baranowski did
 6 make verbal slanderous statements to past and present students of The School regarding
 7 the accreditation of The School causing extreme emotional distress, humiliation and loss
 8 of reputation to the Plaintiff.” (Doc. 120 ¶ 4.2.) Wells does not specify the contents of
 9 any of these verbal statements. She claims that Defendant Baranowski sent a March 19,
 10 2013 letter to hybrid course students “stating that they would not be approved for APA
 11 Membership based solely due to the fact that they took the Hybrid Course” and inferring
 12 “that The School’s Hybrid Course students were inferior in their learning and capacity to
 13 perform polygraph examinations.” (Id. ¶ 3.60.) Once again, Plaintiff does not establish
 14 that these statements concerned her. She fails to establish a claim of either slander or
 15 libel. Thus, Plaintiff’s two remaining libel claims and one remaining slander claim are
 16 dismissed.

17 **III. Negligence Claim**

18 Finally, Defendants move to dismiss Plaintiff’s remaining negligence claim. To
 19 establish a claim for negligence, Wells must establish “(1) a duty requiring the defendant
 20 to conform to a certain standard of care; (2) a breach by the defendant of that standard;
 21 (3) a causal connection between the defendant’s conduct and the resulting injury; and (4)
 22 actual damages.” *Gipson v. Kasey*, 214 Ariz. 141, 143, 150 P.3d 228, 230 (2007). “Under
 23 Arizona law, to sustain an action for negligence, plaintiffs must establish that ‘there is a
 24 duty or obligation, recognized by law, which requires the defendant to conform to a
 25 particular standard of conduct.’” *Keams v. Tempe Technical Inst., Inc.*, 110 F.3d 44, 47
 26 (9th Cir. 1997) (quoting *Hamman v. Cnty. of Maricopa*, 161 Ariz. 58, 775 P.2d 1122,
 27 1125 (1989)).

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1 In her remaining negligence claim, Wells alleges that the APA “deviated from the
2 acceptable standard of care required of an accrediting agency” by having a manual
3 “which is internally contradictory, overly broad, internally inconsistent, vague, outdated,
4 irrational and . . . generally so flawed as to be unusable.” (Doc. 120 ¶¶ 4.74–84.) This
5 manual “is written with such insufficient definiteness and in such a manner that it
6 encourages arbitrary and discriminatory enforcement by the Committee.” (*Id.* ¶ 4.82.)
7 She asserts that the flawed manual lead the School to be subjected “to abuse through
8 selective enforcement.” (*Id.* ¶ 4.83.)

9 Defendants move to dismiss on the grounds that Plaintiff has failed to establish
10 that the APA owed her a duty as an accrediting agency. They cite *Keams v. Tempe*
11 *Technical Institute, Inc.*, 110 F.3d at 45, in which the Ninth Circuit, interpreting Arizona
12 law, held that an accrediting agency owed no duty of care to the students of the schools
13 they accredit. Other federal courts have similarly refused to permit claims of negligent
14 accreditation. *See, e.g., Ambrose v. New England Ass’n of Sch. & Colls., Inc.*, 252 F.3d
15 488, 499 (1st Cir. 2001) (surveying decisions involving accreditation claims nationwide
16 and finding that “[w]e very much doubt the existence of a cause of action for negligent
17 accreditation on behalf of third parties”). Here, Plaintiff has provided no basis on which
18 the Court should recognize that such a duty was owed personally to her as the director or
19 owner of the School. Plaintiff does not address these arguments or even reference her
20 negligence claim in her Response to Defendant’s Motion. Plaintiff has failed to establish
21 that the APA owed her a duty as an accrediting agency, and thus her negligence claim is
22 dismissed. Therefore,

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1 **IT IS ORDERED** that Defendants' Motion to Dismiss Plaintiff Wells' Amended
2 Complaint (Doc. 128) is **granted**. The Clerk of Court shall terminate this action and enter
3 judgment.

4 Dated this 28th day of July, 2014.

G. Murray Snow
G. Murray Snow
United States District Judge